Supreme Court, U.S.
FILED
OCT 26 1992
OFFICE OF THE CLERK

No. 92-559

In The

Supreme Court of the United States

October Term, 1992

COUNTY OF DUVAL, *ET AL.*,

Petitioners,

vs.

ANTONIA PEREZ, *ET AL.*,

Respondents.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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RESPONDENTS' BRIEF IN OPPOSITION

TO THE HONORABLE SUPREME COURT:

The Respondents ANTONIA PEREZ, *et al.*, respectfully request that this Court deny the Petition for Writ of Certiorari submitted by the Petitioners, County of Duval, *et al.*

STATUTORY AND CONSTITUTIONAL PROVISIONS

The Statutes and Constitutional Provisions which apply to this case are the First Amendment of the United States Constitution and 42 U.S.C. Section 1983.

STATEMENT

Petitioners' entire argument is based on assertions and premises that the jury failed to believe and accept.

Petitioners argue that they ran on a ticket stressing governmental economy and budget reform. They sought to impress the jury that they were motivated by budgetary stringencies and economic reform in terminating Respondents.

But the jury did not accept the arguments that Petitioners now present to this Court. The jury found that Petitioners' First Amendment activity was a substantial motivating factor in the termination decisions, the decisions would not have been made in the absence of the protected activity; that Petitioners did not act in good faith; and that Petitioners acted with malice (R. Pl. Vol. 3, Doc. Ent. 47 – Jury Issues).

Succinctly the trial court in denying Petitioners' Motion for Judgment notwithstanding the verdict made the cogent observation:

"The Court has decided this is a sufficiently demonstrated First Amendment activity to let the jury verdict stand as to those Plaintiffs, given testimony that the practice of Duval County politics is not only highly visible but peculiarly so with significant economic social overtones; that the terminations were undertaken without explanations given to the employees; that there was contradiction in Defendants' testimonies; and that there was little or no demonstration of neutral and objective factors considered in terminating individuals". (Appendix C, Petitioners' Brief).

Thus, Petitioners' argument in its factual statement flies in the face of the jury verdict and the fact that an appeals court is not free to weigh the evidence or pass on the credibility of the witnesses or to substitute its judgment of the facts for that of the jury. Instead, it must view the evidence most favorable to the prevailing party and give that party the benefit of all reasonable inferences from the evidence. See *Federal Practice and Procedure*, Wright & Miller, Vol. 9, Section 2524, pp. 543-545.

Some cogent observations in the record suffice to show the implausibility of Petitioner's position that they were motivated by budgetary concerns and not by political animus that resulted in the termination of Respondents.

THE BUDGET PROBLEM

With reference to the budget problem, the county auditor, Mr. Hinojosa, had indicated to the Commissioner's Court in October 1986 that there was a need to cut $92,000.00 from the budget by the end of the year (PX-44, R-Tr. Vol. III, p. 386). A question arose as to whether that problem had been corrected by the previous commissioner's court under Judge Uresti and whether there had been a 6% reduction in salaries to meet that $92,000.00 deficit (R-Tr. Vol. II, p. 387).

In speaking of the budget problem, Petitioner Frank Garcia, admitted that he erroneously stated that Judge Uresti had budgeted $10 Million for the year 1987 and that was not a correct figure (R-Tr. Vol. III, p. 394). He had

claimed that Judge Uresti had overbudgeted by $10 Million (R-Tr. Vol. III, p. 389). Judge Uresti in fact had provided for a budget of $6.6 Million (R-Tr. Vol. III, p. 393). The budget for 86-87 was for $6.6 Million and the previous board had already gone through a budget reduction process to take care of a $3.6 Million shortfall (R-Tr. Vol. III, p. 395-396, PX-48). The budget provided for the collection of $900,000.00 of delinquent taxes (PX-48). Though there was testimony by Petitioners critical of this expectation, nonetheless, Petitioners still provided for $700,000.00 in delinquent tax collections in the 1987 budget (R-Tr. Vol. III p. 409) And the problem of not collecting delinquent taxes could not have been in the minds of Petitioners in January 1987. There was no report on the status of tax collections from the tax collection attorneys until June 1987 (R-Tr. Vol. III, p. 409).

The supposed budget problem involved a $3.6 Million shortfall from the previous year. Former Judge Frank Garcia, Petitioner, admitted in his testimony that the previous commissioner's court in October 1986 in adopting the budget, tried to correct that problem by not spending that $3.6 Million (R-Tr. Vol. III., p. 397).

There were other nuances about the budget that was alluded to in the evidence. For example, Duval County traditionally has collected garbage for the Cities of San Diego, Benavides and Freer although not required to (R-Tr. Vol. III, p. 398) and the cities are not charged (R-Tr. Vol. III, p. 398). The County Auditor testified that the 85-86 budget of $10.1 million was reduced to $6.6 Million for 86-87 (R. Tr. Vol. V, p. 843). He added that he did not report the budget problem to the Commissioner's Court in January 1987; in fact, the first time he reported this

problem to Commissioner's Court was in March 1987 (R-Tr. Vol. V, p. 816). He also said there was some additional revenue to the County after the 86-87 budget year in the amount of $650,000.00 because a bonded debt in that amount was retired (R-Tr. Vol. V, p. 817).

The issue of the number of County employees was contradictory. The Auditor testified about expenditures but did not know how much the County spent in 1987 for claim employees and was not asked to bring any records pertaining to the number of claim employees (R-Tr. Vol. V, p. 808). He testified at trial that before the dismissals there were 314 employees in January 1987 (R-Tr. Vol. VI, p. 853). But earlier at the time of his deposition, he had alluded to 260 (R-Tr. Vol. V, p. 854). He had provided a list of employees hired since January 1987 but had left names off the list (R-Tr. Vol. V, pp. 821-822). There was also a discrepancy in his testimony on the amount of delinquent taxes collected.

The 1986-1987 budget indicated that $4.1 Million in delinquent taxes were due the County (R-Tr. Vol. V, p. 813).

The taxes were not collected but the auditor could not account for the discrepancy (R-Tr. Vol. V, p. 814).

THE TERMINATED EMPLOYEES

The central factual dispute in this case involved the reason for termination of Respondents' employment with Duval County in January 1987 as soon as Petitioners took office. Although Petitioners testified that the decision to

terminate Respondents was motivated by the need to balance the budget in the face of alleged budgetary problems, their explanations were rejected by the jury in light of the overabundance of testimony that such reasons were pretextual. Respondents rejected the budgetary concern as "pretextual" because Petitioners immediately replaced the terminated employees with persons who were politically affiliated with Petitioners (R. Pl. Vol. 4, Doc. Ent. 1, Complaint p. 5). The evidence establishes and the jury found that the Respondents were terminated for supporting or voting for political opponents of Petitioners in the 1986 primary election (Special Issues 1-6, R. Pl. Vol. 3, Doc. Ent. 47); that Petitioners would not have discharged Respondents irrespective of their political activity (Special Issues 7-11, R. Pl. Vol. 3, Doc. Ent. 47); that Petitioners, in their decision to terminate Respondents, did not act in good faith (Special Issues 13-17, R. Pl. Vol. III, Doc. Ent. 47); and that Petitioners acted with malice or reckless disregard of Respondents rights (Special Issue 20, R. Pl. Vol. III, Doc. Ent. 47).

Employees who were terminated had supported the losing candidates, invariably were replaced by persons who had supported Petitioners and were not given reasons for the termination like Sylvia Saenz (R-Tr. Vol. I, pp. 4-16) and Lydia Perez (R-Tr., Vol. I, pp. 42-52). Antonia Perez was discharged and had campaigned for Judge Uresti and witnessed persons who campaigned for Judge Garcia, all of whom got hired by the new administration (R-Tr., Vol. I, pp. 71-81, R.-Tr., Vol. II, p. 316) and in one instance, a new position was created for Berta Guerra, a campaigner for one of the Petitioners (R-Tr. Vol. II, p. 79).

Similarly, Juan Barrera (R-Tr. Vol. I, pp. 109-115), Luis Martinez (R-Tr. Vol. I, p. 132) Oralia Arredondo (R-Tr. Vol. I. pp. 155-158) and Diamantina Davila (R-Tr. Vol. II, p. 302), and Cecilio Alaniz (R-Tr. Vol. II, pp. 544-550) were abruptly terminated.

Mr. Alaniz was replaced by a Ramiro Cantu (R-Tr. Vol. III., p. 559).

Blanca Garza who died before this case was tried, took one week off to campaign for Judge Uresti and Commissioner Wiederkehr (who was defeated by Petitioner Lee), was terminated (R-Tr. Vol. III, pp. 560-561).

Richard Martin who had supported Judge Uresti was told his job as a mechanic was eliminated, but the job went to Petitioner Judge Garcia's brothers (R-Tr. Vol. IV, pp. 606-608).

Respondent Pablo Chavera, helped the defeated candidates in the 1986 election, was terminated in January 1987 and replaced by a man who helped Petitioner Flores in the election (R-Tr. Vol. IV, pp. 701-703). Petitioner Flores told him that he would be laid off if he didn't vote for him (R-Tr. Vol. IV, p. 704).

The rapidity of the terminations – all the Respondents were fired by January 15, 1987 – and within two weeks in office, the new administration had fired thirty-eight (38) employees (R-Tr. Vol. II p. 317) without providing reasons, yet Petitioners managed to re-hire new employees and created new positions for some (R-Tr. Vol. II, p. 347).

This situation is in a community where the government is the biggest employer (R-Tr. Vol. II, p. 311), where

the Petitioner, Judge Garcia, knows who the players are and if they are actively involved and what side they are on (R-Tr. Vol. II, p. 313) and where political patronage admittedly has played a large part in County politics (R-Tr. Vol. II, p. 315).

One of the Petitioners, Commissioner Flores admitted the County had fired forty-six (46) employees and hired thirty-eight (38) in addition to thirty-five (35) claims employees not listed on the budget (R-Tr. Vol. II. p. 198).

While Petitioner, Judge Garcia claimed he replaced one employee because the replacement Palmira Carrillo, was better qualified, he did not know Lydia Trevino who Carrillo replaced. He did not check her performance, he had no personnel files on people and he had no evaluations on the terminated employees (R-Tr. Vol. II, pp. 320-322).

Petitioner Judge Garcia in an apparent contradiction testified that there had been no meetings between him and other commissioners in December 1986 (R-Tr. Vol. III, p. 384). Yet, he was contradicted by Commissioners Lee and Barton that they had met at Commissioner Barton's ranch in December 1986 to discuss County reorganization (R-Tr. Vol. III, p. 503, 504, R. Tr.-Vol. IV, p. 594).

Respondents that worked at the civic centers were fired and told the positions of Director were being eliminated. The directors were supporters of the old administration (R-Tr. Vol. II. pp. 191-194). Yet, supporters of the Petitioners were placed in their stead and at least in one case, at a higher salary (R-Tr. Vol. II, pp. 195-196).

Petitioners were sworn in on January 1, and posted notice for a special meeting to involve personnel actions on January 5 (R-Tr. Vol. II, p. 349). At the meeting, positions, departments and names were discussed (R-Tr. Vol. IV, p. 593).

REASONS FOR DENYING THE WRIT OF CERTIORARI

I. PETITIONERS PRESENT AN INSUBSTANTIAL FEDERAL QUESTION BECAUSE THE DECISION BY FIFTH CIRCUIT COURT OF APPEALS IS CONSISTENT WITH THIS COURT'S DECISIONS IN *MT. HEALTHY CITY SCHOOL DISTRICT BOARD OF EDUCATION V. DOYLE*, 429 U.S. 274, 50 L.Ed.2d 471, 97 S. Ct. 568 (1977) AND WITH *RUTAN V. REPUBLICAN PARTY OF ILLINOIS*, 110 S. Ct. 2729 (1990) AND WITH *ELROD V. BURNS*, 427 U.S. 347, 49 L.Ed.2d 547, 96 S. Ct. 2673 (1976) AND OTHER LOWER COURT DECISIONS AND DECISIONS OF THE FIFTH CIRCUIT COURT OF APPEALS.

This Court in *Mt. Healthy, supra,* held that even though the terminated employee could have been discharged for no reason whatever, he may nonetheless establish a claim to reinstatement if the decision not to rehire him was made by reason of his exercise of constitutional protected First Amendment freedoms, citing *Perry v. Sindermann,* 408 U.S. 593, 33 L.Ed.2d 570, 92 S. Ct. 2694 (1972).

The Court went on to say that if a nonpermissible reason e.g. exercise of First Amendment rights, played a substantial part in the decision not to renew – even in the face of other permissible grounds – the decision may not stand.

The Court established a standard in *Mt. Healthy* that the initial burden is on the employee to show:

1. that his conduct was constitutionally protected;

2. that this conduct was a substantial or motivating factor in the Board's decision not to re-hire him;

Having met that burden, the Board must show by a preponderance of the evidence as a defense to its termination action that it would have reached the same decision as to Respondents' reemployment even in the absence of the protected conduct.

In *Perry v. Sindermann, supra,* at 408 U.S. 597, this Court noted that:

"For at least a quarter century, this Court has made clear that even though a person has no right to a valuable governmental benefit and even though the government may deny him the benefit for any number of reasons, there are some reasons upon which the government may not rely. It may not deny a benefit to a person on a basis that infringes his constitutionally protected interests, especially his interest in freedom of speech . . . we have applied the principle to denials of public employment (citing authorities)".

In *Pickering v. Board of Education,* 391 U.S. 563, 20 L.Ed.2d 811, 88 S. Ct. 1731 (1968), this Court held that an employee's right to speak on issues of public importance cannot furnish the basis for his dismissal.

In *Elrod v. Burns,* 427 U.S. 347, 49 L.Ed.2d 547, 96 S. Ct. 2673 (1976), this Court held that the practice of

patronage, especially patronage dismissals placed severe restrictions on freedoms of political belief and association which could be justified only if the government showed that patronage dismissals furthered some vital governmental end by a means that was least restrictive of freedom of belief and association in achieving such end . . . and that any contribution of patronage dismissals to the democratic process cannot override the severe encroachment on First Amendment freedoms.

Justice Stewart in a concurring opinion at 427 U.S. 375, observed that the single question involved in the case was whether a nonpolicymaking, nonconfidential government employee can be discharged or threatened with discharge from a job that he is satisfactorily performing upon the sole ground of his political beliefs and held he cannot.

Petitioners place emphasis on use of the term "sole" ground. However, as applied to the facts of this case, the jury made a determination pursuant to the *Mt. Healthy* standard that the motivating factor for Respondents' termination was their support of opposition candidates and as noted above, there was ample evidence to support such a conclusion. Petitioners agree in the pretrial order that this was the relevant issue to be decided by the jury and in their failure to complain at the trial level or to raise the issue whether their political involvement was the "sole" reason for their termination, have waived such a complaint, *Fraternal Order of Police, Hobart Lodge #121 v. City of Hobart,* 864 F.2d 551 (7th Cir., 1988) at p. 554.

The Court in *Elrod v. Burns* noted at 427 U.S. 356 political belief and association is at the core of those

activities protected by the First Amendment which protects political association as well as political expression . . . , there can no longer be any doubt that freedom to associate with others for the common advancement of political beliefs and ideas is a form of 'orderly group activity' protected by the First and Fourteenth Amendments" at p. 427.

In *Rutan v. Republican Party of Illinois*, 110 S. Ct. 2729 (1990), the *Elrod v. Burns* principles were expanded to promotions, transfers and recalls after layoffs. The Court said at p. 2737, that promotions, transfers and recalls after layoffs based on political affiliation or support are an impermissible infringement on the First Amendment rights of public employees.

Conditioning hiring decisions on political belief and association plainly constitutes an unconstitutional condition of employment, unless the government has a vital interest in doing so, *Rutan*, p. 2739.

As in the instant case, the Court noted no such compelling government interest was shown.

The Court in *Rutan*, also answered a question raised by Petitioners in the instant case in their petition at p. 12. They decry that the issue in *Rutan* and other cases cited was narrow, and that the Fifth Circuit decision is inconsistent with this Court's recognition of the substantial interest of government in carrying out "policies which the electorate has sanctioned."

The Court noted in *Rutan*, at 110 S. Ct. 2740, citing and quoting from *Perry v. Sindermann*, that the State's action is subject to federal judicial review and will not be

upheld if a termination is motivated by constitutionally impermissible reasons.

Respondents met their burden of proof in this case that they were discharged for constitutionally impermissible reasons.

A Plaintiff need only prove that the protected activity was a "substantial" factor in the decision to terminate; it is not necessary to demonstrate that the dismissal was based solely on these activities, *Mt. Healthy City School District v. Doyle, supra.* The 5th Circuit has applied the *Mt. Healthy* standard in retaliatory discharge cases, *Robinson v. Boyer,* 825 F.2d 64 (5th Cir., 1987); *Montgomery v. Trinity Independent School District,* 809 F.2d 1058 (5th Cir. 1987); *Avery v. Homewood City Board of Education,* 674 F.2d 337 (5th Cir., 1982), cert. denied, 461 U.S. 943, 103 S. Ct. 2119, 77 L.Ed.2d 1300 (1983); *Goss v. San Jacinto Junior College,* 588 F.2d 96 (5th Cir., 1979); *Burris v. Willis Independent School District,* 713 F.2d 1087 (5th Cir., 1983).

The Fifth Circuit's decision in this case is consistent with prior decisions. The decision is not inconsistent with *Kinsey v. Salado Independent School District,* 950 F.2d 988 (5th Cir., 1992), because *Kinsey* was the school superintendent who was terminated by the new board who he had publicly opposed. He was a confidential, policymaking employee. The Board was entitled to a superintendent that shared its management philosophy. The issues in that case are not applicable here.

Respondents met their burden by uncontradicted proof that they had supported defeated candidates Uresti and Saenz in the 1986 election; that as soon as Judge Garcia took office in January 1987, Respondents were

terminated, that no reasons were given for their abrupt terminations, nor were they interviewed. Though Petitioners claimed budget problems as motivation for the terminations, new positions were in some cases created and the budgetary stringencies were at best, superficial.

Respondents established the initial threshold requirement of the *Mt. Healthy* standard and the Petitioners failed to meet their burden which shifted to them to prove by a preponderance of the evidence that Respondents would not have been dismissed "but for" their political affiliations, *Mercado-Melendez v. Aponte-Roque,* 829 F.2d 255 (1st Cir., 1987); *North Mississippi Communications, Inc. v. Jones,* 874 F.2d 1064 (5th Cir., 1989).

The discharges could have been justified had Petitioners demonstrated that Respondents would have been terminated regardless of the constitutionally protected conduct, *McKinley v. City of Eloy,* 705 F.2d 1110 (9th Cir., 1983).

This they failed to do and the jury proceeded to find that Petitioners did not act in good faith, that they acted with malice or reckless disregard of Respondents' rights and awarded to Respondents damages, all of which findings have ample evidentiary support.

The absence of a reason for termination adds weight to the allegation that Respondents' discharge resulted from constitutionally impermissible reasons; *Robinson v. Wichita Falls & North Texas Com. Act. Corp.,* 507 F.2d 245 (5th Cir., 1975).

While the Supreme Court provided no guidance on how the *Mt. Healthy* standard can be met, "it is clear that

Plaintiff need not present direct evidence . . . ", *Clark v. Library of Congress*, 750 F.2d 89 (D.C. Cir., 1984) at p. 101; and the Court can look to "timing, hostility and even admissions that relate to motivation for the Defendant's conduct" (*Clark, supra*, at p. 1068).

Thus, the Fifth Circuit in *Burris v. Willis Independent School District, Inc., supra*, where the District Court had entered a directed verdict for the school district, the Court in remanding, noted at p. 1095; our inquiry "is whether there is substantial evidence supporting the board's claim that Burris' protected conduct, if it existed, did not play a substantial role in the board's decision not to renew his contract. As already mentioned, there was evidence that Burris associated with members of the old board majority on at least one of the political issues involving the school. One of the first acts by the new faction, upon gaining control of the board, was to decide not to renew Burris' contract . . . we conclude that a reasonable juror could conclude that this decision was motivated to a substantial degree by Burris' protected activity."

Thus, under facts much less aggravating than those in the instant case, the Fifth Circuit ruled in favor of the terminated employee on the *Mt. Healthy* issue whether the Plaintiff's constitutionally protected activity was a substantial or motivating factor in the decision not to renew his contract. Once the Plaintiff meets this burden, the burden of proof shifts to the Defendant to show by a preponderance of the evidence that it would have reached the same decision as to reemployment even in the absence of the protected conduct; *Burris v. Willis Independent School District, supra*, at p. 1093; *Reeves v.*

Claiborne County Board of Education, 828 F.2d 1096 (5th Cir., 1987); *Bueno v. City of Donna*, 714 F.2d 484 (5th Cir., 1983).

The Respondents in this case demonstrated and the jury found that Respondents supported and voted for political opponents (Uresti and Saenz) of Petitioners in the 1986 primary election. (Jury's response to Special Issue No. 1).

The evidence was uncontradicted that those persons discharged by Petitioners in January 1987 had actively supported either former Judge Uresti or Commissioner Saenz. More importantly, most if not all the Respondents were immediately replaced by persons loyal to Judge Garcia and who had supported Judge Garcia. While the only direct evidence of political motivation was that respondent Pablo Chavera who testified that Commissioner Flores had told him that people who did not support him (Flores), were going to be terminated (R-Tr. Vol. IV, p. 704), there was ample circumstantial evidence to support the findings at Special Issues 2-6. The jury could infer from the evidence presented that Respondents' political activity was a substantial or motivating factor in Petitioners' decision to discharge them. The rapidity of their dismissals within days after the new judge and two commissioners were sworn in, coupled with the immediate appointment of replacements, pretextual reasons given without consideration of Respondents' qualifications, (such as in the case of Mr. Chavera who wasn't even asked if he could operate the heavy equipment, R-Tr. Vol. IV., p. 703), dismissals of longtime employees while their replacements were being interviewed (testimony of Janie Ruiz concerning the firing of

Cecilio Alaniz), and the passive attitude of some of the Petitioners (Commissioners Flores and Garcia) concerning the dismissals, all give support to the jury's findings. Equally significant and reflecting the animus of Petitioners' arbitrary conduct was the fact that not one single discharged employee was interviewed or evaluated before the termination action. A constitutional litigant need not present direct evidence to discharge his or her threshold *Mt. Healthy* burden. Various courts have held that circumstantial evidence may be used to prove that constitutionally protected conduct was a substantial or motivating factor in a contested employment decision; *Rosario-Torres, et al. v. Hernandez-Colon, et al.*, 875 F.2d 351 (1st Cir., 1989), at p. 355, citing *Clark v. Library of Congress*, 750 F.2d 89 (D.C. Cir., 1984); *Allaire v. Rogers*, 658 F.2d 1055 (5th Cir., 1981).

The facts in the instant case are not generally dissimilar to those in *Conklin v. Lovely*, 834 F.2d 534 (6th Cir., 1987), where the appeals court reversed a summary judgment entered by trial court against the Plaintiff who was not given reasons for her termination and had supported a defeated candidate.

Forty-six employees were fired in January 1987 but thirty-eight employees were hired and thirty-five claims employees were not listed on the budget (R-Tr. Vol. II., p. 198).

Judge Garcia hired Palmira Carrillo to replace Lydia Trevino because he figured she was better qualified but he didn't know Lydia Trevino and didn't check her performance and he had no evaluations nor files on people (R-Tr. Vol. II, pp. 319-322).

In this respect, its certainly significant that Palmira Carrillo was the daughter-in-law of a former state representative (R-Tr. Vol. II, p. 314); she was then President of the Board of Trustees of the Benavides Independent School District, married to the brother-in-law of Petitioner Flores (R-Tr. Vol. II, p. 210). She was a campaigner for Judge Garcia (R-Tr. Vol. I, pp. 78-79).

There are many other factors that have to be assessed in the testimony; the fact that political patronage over the years has played a large part in Duval County politics (R-Tr. Vol. II, p. 315); that the biggest employers in Duval County are the County, the City, the Water District and the School and that Judge Garcia's brother is the head of the School Board (R-Tr. Vol. I, p. 113); that Duval County is a highly political community (R-Tr. Vol. II, p. 212) and that the 1986 election was a hotly contested election (R-Tr. Vol. III, p. 882).

The further test under the *Mt. Healthy* analysis is that the Defendant has to show that it would have made the same employment decision in the absence of the protected conduct, *Mt. Healthy,* 429 U.S. at 287, 97 S. Ct. at 576. Once a Plaintiff has demonstrated that an impermissible motive played a motivating part in his adverse treatment, the burden shifts to the Defendant to prove by a preponderance of the evidence that it would have made the same decision in the absence of the protected conduct; *North Mississippi Communications Inc. v. Jones,* 874 F.2d 1064 (5th Cir., 1989). Citing *Price Waterhouse v. Hopkins,* 109 S. Ct. 1775, 104 L.Ed.2d 268. The 5th Circuit in the *North Mississippi Communications Inc.* case, *supra,* noted at p. 1069 "the Supreme Court . . . recently stated in strong language that the mere assertion or demonstration

that legitimate reasons existed for adverse action is not enough to satisfy the employer's burden of proof."

The Petitioners in this case failed to show that they would have made the same decision in the absence of the protected conduct and this is reflected in the jury's answers to special issues 7-11. Though Petitioners cited budgetary stringencies, that issue was embroiled around Petitioner's tax collection practices, their apparent failure to consider alternatives and their immediate rehiring of replacements.

In *Barrett v. Thomas,* 649 F.2d 1193 (5th Cir., 1981), reh. den., 656 F.2d 700, cert. denied, 456 U.S. 925, 72 L.Ed.2d 455, 102 S. Ct. 1992, the Court ruled that once Plaintiffs made a prima facie showing that impermissible reasons motivated the challenged personnel decisions, then the Defendant had to rebut such a showing with sufficient evidence of nonpolitical motives for such conduct. This Petitioners failed to do.

That Petitioners citing of budgetary stringencies as the reason for termination of Respondents' employment was pretextual can be discerned from evidence that Judge Garcia's protests about a $3.6 Million deficit were spurious (there was none, R-Tr. Vol. III pp. 389-396), from the fact that the supposed budgetary problems became known to Petitioners in January 1987 as a result of which they terminated Respondents, yet, they had no report on the status of tax collections until June 1987 (R-Tr. Vol. III, p. 409) and they did not hear from their auditor until March 1987 (R-Tr. Vol. V, p. 816).

To sustain the Petitioners' proof that there were budgetary stringencies that necessitated the terminations,

Petitioners would have had to prove that there were in fact budget problems. But their county auditor's testimony was imprecise and less than clear matching in lack of clarity the testimony of Judge Garcia whose pronouncements of a $3.6 Million shortfall were by his admission, not correct (R-Tr. Vol. III, p. 393-397).

Petitioners failed to meet their burden of proving by a preponderance of the evidence that Respondents were terminated by reason of budget problems.

Petitioners' contentions before this Court that the Fifth Circuits decision improvidently infringes on the Petitioners substantial interest – in carrying out policies that the electorate has sanctioned is not borne by the record.

Petitioners suggest that the Court of Appeals utilized an improper standard of review in evaluating Petitioners' assertion of budgetary justification for terminating Respondents' employment citing *Pilarowski v. Macomb Health Department,* 841 F.2d 1281 (6th Cir.), cert. denied, 109 S. Ct. 133 (1988). But that case was one that involved the termination of Plaintiff on account of budget cuts and the Court held simply that Plaintiff failed to present sufficient proof that the decision to discharge him was made "by reason of his exercise of First Amendment freedoms".

II. THE FIFTH CIRCUIT'S DECISION DOES NOT CONFLICT WITH DECISIONS OF THE FOURTH AND SEVENTH CIRCUITS

The Fifth Circuits decision in this case turned solely on the issue of whether Respondents' terminations were motivated by political animus.

Employment decisions generally are administrative. Administrative acts are not protected by legislative immunity, *Tenney v. Brandhove*, 341 U.S. 367, 71 S. Ct. 783, 95 L.Ed. 1019 (1951), cited by 7th Circuit in *Rateree v. Rockett*, 852 F.2d 946 (7th Cir., 1988).

State legislators are absolutely immune from lawsuits when acting in their legislative capacity, *Tenney, supra.* But in *Rateree* cited by Petitioners, the Court noted at p. 951, that Commissioners are protected from liability when they act in their legislative capacity but when they act administratively, they are not.

The Court found in *Rateree* that the actions of the Commissioners in adopting the budget and eliminating jobs were legislative and thus immunity attached. But there, the budget ordinance eliminated the jobs and no one was hired to replace the Plaintiffs, *Rateree* at p. 950 and noted that Defendants did not fire the Plaintiffs but rather eliminated their jobs from the city budget.

Thus, there is a distinction between the 7th Circuits holding in *Rateree* and the instant case where the Respondents were fired and the budgetary constraints seem to have arisen as an afterthought. There was no ordinance or legislative enactment that deserves immunity. The act of discharging Respondents was administrative.

Moreover, a legislator can be held liable for a termination decision violative of an employee's constitutional rights, *Davis v. Passman*, 442 U.S. 228, 60 L.Ed.2d 846, 99 S. Ct. 2264 (1979); as can a Judge who normally is shielded by absolute judicial immunity but nonetheless can be held liable under 42 U.S.C. 1983 for an impermissible employment decision, *Forrester v. White*, 484 U.S. 219, 98 L.Ed.2d 555, 108 S. Ct. 538 (1988).

Beyond that, the Petitioners did not raise the legislative immunity issue in the trial court, thus have waived that defense, *Fraternal Order of Police, Hobart Lodge No. 121, supra* at p. 554, because the government official seeking immunity has the burden of showing the exemption from personal liability, *Rateree* at p. 950.

Similarly, the Fourth Circuits' opinions cited by Petitioners are distinguishable and do not conflict with the Fifth Circuit's decision in this case. Although, the Courts held that local governmental bodies were immune from liability, a budget ordinance had been adopted in both instances so the actions taken were – unlike the instant case – legislative actions, *Hollyday v. Rainey*, 964 F.2d 1441 (4th Cir., 1992); *Baker v. Mayor & City Council of Baltimore*, 894 F.2d 679 (4th Cir., 1990).

CONCLUSION AND PRAYER

This Court should deny the writ of Certiorari because Petitioners present an insubstantial federal question and the Fifth Circuit's decision in this case is consistent with the Supreme Court's prior decisions and with its own and other circuit court decisions.

Respondents pray the Writ of Certiorari be denied.

Respectfully submitted,

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